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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92046796
Party	Plaintiff eSpeed, Inc.
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Submission	Motion to Amend Pleading/Amended Pleading
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ESPEED, INC.,)	
)	
Petitioner,)	
)	Cancellation No. 92046796
vs.)	
)	Mark: ESPEEDIENT SYSTEMS
ESPEEDIENT SYSTEMS, LLC,)	
)	
Registrant.)	

**PETITIONER’S MOTION FOR LEAVE TO AMEND PETITION TO CANCEL,
AND BRIEF IN SUPPORT THEREOF**

Petitioner eSpeed, Inc. (“eSpeed”), pursuant to 37 C.F.R. § 2.115 and Fed. R. Civ. P. 15(a), hereby seeks leave to amend its Petition to Cancel to add, as additional bases for cancellation, (1) that, at the time Respondent Espeedient Systems, LLC (“Espeedient”) filed its use-based application to register the mark ESPEEDIENT SYSTEMS, the ESPEEDIENT SYSTEMS mark was not in use in commerce in connection with any of the goods or services identified in said application; and (2) that Espeedient has committed fraud upon the United States Patent and Trademark Office in the procurement of its registration of the ESPEEDIENT SYSTEMS mark, all as alleged in eSpeed’s proposed Amended Petition to Cancel, which is attached hereto as Exhibit A. A redline comparison of eSpeed’s original Petition to Cancel, filed on December 19, 2006, with eSpeed’s proposed Amended Petition to Cancel, is attached hereto as Exhibit B for ease of reference. eSpeed further requests that the close of the discovery period (presently scheduled to close September 6, 2007) be reset once the Board has ruled upon this Motion.

As its Brief in Support of this Motion, eSpeed states as follows:

FACTUAL BACKGROUND

Through discovery in this matter, the following facts have been revealed:

On October 18, 2002, Espeedient filed an application (App. Ser. No. 78/175,874) to register the mark ESPEEDIENT SYSTEMS on the Principal Register of the United States Patent and Trademark Office (“USPTO”) for use in connection with certain goods and services identified therein (the “Application”). A copy of the Application is attached hereto as Exhibit C. In the Application, Espeedient claimed both use of the ESPEEDIENT SYSTEMS mark in commerce, under 15 U.S.C. § 1051(a), and a *bona fide* intent to use the mark in commerce, under 15 U.S.C. § 1051(b), for the goods and services specified in the Application. *See* Ex. C.

On May 5, 2003, the USPTO issued to Espeedient an Office Action on the Application, attached hereto as Exhibit D, in which the examining attorney stated that Espeedient could not claim *both* the use of the mark in commerce and an intent to use the mark in commerce as the basis for registration of the same goods and services. The Examining Attorney required Espeedient to delete one of these bases, or divide the goods and services between the two bases, as appropriate. *See* Ex. D. The Examining Attorney also refused the specimens provided in the original Application and required that a substitute specimen, showing the mark as used on the goods or services in commerce, be submitted. *See id.* Espeedient was to submit, with any substitute specimen, an affidavit or declaration by Espeedient that the substitute specimen was in use in commerce at least as early as the filing date of the application, October 18, 2002. *See id.*

On November 5, 2003, Espeedient filed a response to the May 5, 2003 Office Action, in which it deleted the intent-to-use basis for the Application, thereby electing to proceed with the Application based on its use of the mark ESPEEDIENT SYSTEMS in commerce. More than six months later, on May 19, 2004, counsel for Espeedient submitted a substitute specimen, as required by the May 5, 2003 Office Action and a subsequent Office Action dated February 27, 2004, and, through its “Attorney” Melissa S. Dellenbeck, signed and submitted a declaration that contained the following statement: “The substitute specimen was in use in commerce at least as early as the filing date of the application.” By signing the declaration, attached hereto as Exhibit E, Ms. Dillenbeck declared, *inter alia* and on Espeedient’s behalf, that the facts set forth in the Application and that filing were true, which included the claim that the substitute specimen was in use as of the October 18, 2002 filing date of the Application. Furthermore, the declaration warned that “willful false statements may jeopardize the validity of the application or any resulting registration.” *See* Ex. E. The substitute specimen shows the mark ESPEEDIENT SYSTEMS presumably used in connection with a web page and web-based interface, and bearing a copyright notice stating “Copyright 2004 eSpeedient Systems, LLC,” and bearing an indication that the specimen was printed out on “3/10/04.” *See id.* Neither Espeedient nor Ms. Dillenbeck has provided any explanation for how a specimen created in 2004 was or could have been in use as of October 18, 2002.

ARGUMENT

I. Standard for Granting Motions to Amend

Pleadings in a cancellation proceeding may be amended in the same manner and to the same extent as in a civil action. 37 C.F.R. § 2.115. Rule 15(a) of the Federal Rules of

Civil Procedure provides that a party may amend its pleadings by leave of court and that “leave shall be freely given when justice so requires.” As the United States Supreme Court has observed with respect to Rule 15(a):

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.”

Foman v. Davis, 331 U.S. 178, 182 (1962).

Consistent with *Foman*, the Board has recognized that “amendments to pleadings should be allowed with great liberality at any stage of the proceeding where necessary to bring about a furtherance of justice unless it is shown that entry of the amendment would violate settled law or be prejudicial to the rights of the opposing parties.” *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503, 1505 (T.T.A.B. 1993) (quoting *American Optical Corp. v. American Olean Tile Co., Inc.*, 168 U.S.P.Q. 471, 473 (T.T.A.B. 1971)). Thus, in ruling on a motion for leave to amend, the Board should consider (1) whether a petitioner’s proposed amended claim is legally sufficient, and (2) whether there is any undue prejudice to the registrant in allowing the amendment. *Commodore*, 26 U.S.P.Q.2d at 1505. In this case, eSpeed’s additional claims are legally sufficient and the addition of such claims presents no undue prejudice to Espeedient.

II. eSpeed’s Proposed Additional Claims are Legally Sufficient

To satisfy the requirement that a proposed amended claim be legally sufficient, the additional claim must merely be able to “withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), which is a test solely of the legal sufficiency of the facts and claim underlying the

amendment ...” *Commodore*, 26 U.S.P.Q.2d at 1506 (citing *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185, 188 (C.C.P.A. 1982)). eSpeed’s proposed Amended Petition to Cancel clearly meets this standard.

eSpeed’s first additional claim of non-use of the now-registered mark at the time of the Application’s filing is well-supported by the current case law. Section 1(a) of the Lanham Act provides for the registration of marks that are in use in commerce, whereas Section 1(b) permits applicants to apply for registration based on their bona fide intent to use a mark in commerce. 15 U.S.C. § 1051. Therefore, a mark is registered on the Principal Register only upon a showing of use in commerce. *See id.*

At the time Espeedient filed its Application, Espeedient claimed to have both used the ESPEEDIENT SYSTEMS mark in commerce in connection with the goods and services specified in the Application and to have a *bona fide* intent to use the same mark for the same goods and services. Because these two bases are mutually exclusive, Espeedient was forced to choose a single basis on which to proceed, and Espeedient proceeded on the basis that the mark was in use as of the Application’s filing date, October 18, 2002. However, eSpeed has, through discovery, come to believe that Espeedient was not using the ESPEEDIENT SYSTEMS mark in commerce in connection with *any* goods or services as of the Application’s October 18, 2002 filing date. Therefore, Espeedient’s registration for the ESPEEDIENT SYSTEMS mark is susceptible to cancellation due to such non-use.

eSpeed’s second additional claim of fraud is equally as viable. Fraud occurs when a registrant makes a false material representation that the registrant knew or should have known was false in connection with an application to register a mark. *See, e.g., Hachette Filipacchi Presse v. Elle Belle LLC*, 2007 WL 1144946 (T.T.A.B. Cancellation No.

92042991, April 9, 2007). The Board has found fraud where a registrant claims use of a mark in connection with goods or services when there was no such use of a mark. *See Medinol Ltd. v. Neuro Vaxx, Inc.*, 67 U.S.P.Q.2d 1205 (T.T.A.B. 2003). Furthermore, a fraud claim can be based on claims of use because “[s]tatements regarding the use of the mark on goods and services are certainly material to issuance of a registration covering such goods and services.” *Hachette*, 2007 WL 1144946 at * 4 (citing *First International Services Corp. v. Chuckles Inc.*, 5 U.S.P.Q.2d 1628 (T.T.A.B. 1988) (“We find that applicant committed fraud in its statement regarding the use of the mark on goods for which it only intended to use the mark. There is no question that this statement was material to the approval of the application by the Examining Attorney.”); *see also StandardKnitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 U.S.P.Q.2d 1917 (T.T.A.B. 2006) (applicant's counterclaim petition to cancel granted because of fraud due to misrepresentations regarding extent of use of the marks on the goods identified in the applications which resulted in issuance of opposer's pleaded registrations).

In this case, Espeedient, through its counsel, declared to the USPTO that the substitute specimen was in use in commerce as of the date of the October 18, 2002 filing of the Application although the specimen is clearly marked with a 2004 copyright notice. Thus, the substitute specimen could not have been in use as of the Application's October 18, 2002, filing date. Because the specimen and its submission was clearly in Espeedient's control and the copyright notice prominently displayed, Espeedient should have known that this statement was false. Had Espeedient been truthful in its declaration, the registration would not have been issued with the priority date it received. Therefore, Espeedient has committed

fraud on the USPTO in the procurement of the registration for the ESPEEDIENT SYSTEMS mark.

III. Espeedient Will Not Be Prejudiced by Allowing the Amendments

In determining whether the proposed amendment is prejudicial, an important factor for consideration is the timing of the motion for leave to amend. TBMP § 507.02; *see also Focus 21 Int'l Inc. v. Pola Kasei Kogyo Kabushiki Kaisha*, 22 U.S.P.Q.2d 1316, 1318 (T.T.A.B. 1992) (finding no prejudice where petitioner filed motion to amend prior to opening of petitioner's testimony period); *Caron Corp. v. Helena Rubenstein*, 193 U.S.P.Q. 113, 114 (T.T.A.B. 1976) (although discovery period closed, no prejudice because neither party had taken testimony).

In this case, the parties are still engaged in the discovery process and the discovery period is not set to close until September 6, 2007. Moreover, Espeedient will not be prejudiced by the introduction of the new claims recited in the Amended Petition to Cancel because any information necessary to respond to these claims is exclusively within Espeedient's possession, custody or control, and Espeedient will not be required to take discovery from eSpeed or any third parties to defend itself against the additional grounds for cancellation. Moreover, eSpeed has only recently, through the discovery process and its own investigative efforts, obtained sufficient information to believe that the ESPEEDIENT SYSTEMS mark was not in use in commerce on any goods or services as of the October 18, 2002 filing date of the Application, and that Espeedient may have committed a fraud upon the USPTO. Moreover, because the discovery period has not yet closed and will be re-set if this Motion is granted, Espeedient would still have an opportunity to conduct any additional discovery regarding these subjects that it might need. Therefore, Espeedient would not be

prejudiced, at this stage of this proceeding, by the addition of these two claims, nor will the proceeding be significantly delayed.

IV. Good Cause Exists to Re-Set the Close of the Discovery Period

The discovery period in this proceeding is presently scheduled to close on September 6, 2007. If this Motion is granted, eSpeed will likely need additional discovery into the issues raised herein, including a potential need to take the deposition of Attorney Dellenbeck to determine the basis upon which she declared to the USPTO the Respondent's substitute specimen was in use in commerce as of October 18, 2002. Consequently, good cause exists, under Fed. R. Civ. P. 6(b), to re-set the close of the discovery period upon the Board's ruling on this Motion.

CONCLUSION

For the reasons stated above, eSpeed respectfully requests that the Board grant eSpeed's Motion for Leave to Amend Petition to Cancel and allow eSpeed to amend its Petition to Cancel as proposed herein. eSpeed also requests that the Board reset the close of the discovery period in this proceeding upon its ruling on this Motion.

Dated: July 31, 2007

Respectfully submitted,

KILPATRICK STOCKTON LLP

/s/ William M. Bryner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PETITIONER'S MOTION FOR
LEAVE TO AMEND PETITION TO CANCEL, AND BRIEF IN SUPPORT
THEREOF** was served upon counsel for the Respondent by first class mail, addressed as follows:

Richard W. Young
Melissa S. Dillenbeck
DRINKER BIDDLE GARDNER CARTON
191 N. Wacker Drive, Suite 3700
Chicago, IL 60606-1459

This the 31st day of July, 2007.

/s/ William M. Bryner

William M. Bryner

EXHIBIT A

TO PETITIONER'S MOTION FOR LEAVE TO AMEND PETITION TO CANCEL, AND BRIEF IN SUPPORT THEREOF

eSpeed, Inc. v. Espeedient Systems, LLC
Cancellation No. 92046796

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration No. 2,912,657
For the mark: ESPEEDIENT SYSTEMS

ESPEED, INC.,	-----X	
	:	
Petitioner,	:	Cancellation No.
	:	
v.	:	AMENDED PETITION TO CANCEL
	:	
ESPEEDIENT SYSTEMS, LLC,	:	
	:	
Respondent.	:	
	-----X	

eSpeed, Inc., a corporation organized and existing under the laws of the state of Delaware with a principal place of business at 110 East 59th Street, New York, New York 10022, believes that it will be damaged by the above identified registration for the trademark ESPEEDIENT SYSTEMS shown in Registration No. 2,912,657 and hereby petitions to cancel that registration.

The grounds for this cancellation are as follows:

FACTS COMMON TO ALL GROUNDS FOR CANCELLATION

1. eSpeed, Inc., along with its affiliates (collectively “eSpeed” or “Petitioner”), is the largest broker of U.S. government securities, and is a well-known and respected provider of U.S. and international financial brokerage services and information throughout the world. Since at least as early as January, 1999, Petitioner has continuously used and promoted the trademarks ESPEED and E-SPEED (the “ESPEED Mark”) and the ESPEED trade name in connection with a wide variety of

online brokerage, financial, information, technological, software, e-commerce and communication services. In particular, Petitioner uses its ESPEED Mark and trade name for a network and internet-based communication and distribution system that provides customers with immediate access to real-time financial market information and to a global interactive electronic marketplace that enables the instantaneous trading of financial instruments and other products.

2. In addition, eSpeed uses its ESPEED Mark for its proprietary transaction software that can process millions of transactions in milliseconds and in connection with its telecommunication services to provide users with secure, point-to-point communication links for the delivery of data, the execution of transactions and access to the Internet. In total, the ESPEED service is not only a global interactive electronic trading network that can be adapted to virtually any market of any size, but a technological system that powers marketplaces for any type of tradable products.

3. Petitioner has invested a significant amount of time and effort promoting its ESPEED services and in developing goodwill associated with the ESPEED Mark and trade name. Further, Petitioner has obtained several federal registrations for its ESPEED Mark. It owns, *inter alia*, registration number 2,535,418, registered on February 5, 2002, for ESPEED for “computer software that enables trading in financial instruments, provides trade execution and trade confirmation capabilities, and provides access to financial information and financial market information, real time and otherwise” in International Class 9, “telecommunications services, namely, electronic transmission of data via computer

terminals” in International Class 38, and for a variety of financial services in International Class 36, including, *inter alia*, “providing a trading network via an electronic private intranet network and global computer network” and “providing information relating to financial instruments, brokerage, trading investments, companies, and financial markets through a global computer network.” Petitioner is also the owner of registration number 2,500,080, registered October 23, 2001, for ESPEED (stylized) for “telecommunication services, namely, electronic transmission of data; leasing telecommunications equipment and telecommunications lines; providing telecommunications connection to the global computer network” in International Class 38.

4. In addition, Petitioner also owns stylized registrations for ESPEED, including registration number 2,729,582, registered June 24, 2003, for “Computer software that enables trading in financial instruments, provides trade execution and trade confirmation capabilities, and provides access to financial information and financial market information, real time and otherwise, ” and registration number 2,484,458, registered September 4, 2001, for ESPEED (stylized) for “providing multiple-user access to a global computer information network and providing electronic mail services” in International Class 38.

5. Petitioner is also the owner of registration number 2,424,609, registered January 30, 2001, for E-SPEED for “brokerage services for transacting financial securities via a global computer network” in International Class 36. This registration has become incontestable pursuant to Section 15 of the Lanham Act , 15 U.S.C. §

1065, and, as such, is conclusive evidence of the validity of the mark, of Petitioner's exclusive ownership of the mark and of its right to the exclusive use of the mark

6. Petitioner has offered and continues to offer and make available its ESPEED and E-SPEED services to consumers and the trade online through the Internet and through a proprietary electronic network.

7. As a result of Petitioner's usage and promotion of its ESPEED Mark, a very valuable and inestimable goodwill has been built up in the ESPEED Mark.

GROUND 1 – LIKELIHOOD OF CONFUSION

8. Petitioner hereby incorporates by reference the allegations of Paragraphs 1 through 7 hereof as if fully set forth herein.

9. On December 21, 2004, a date well after Petitioner first used the ESPEED Mark, eSpeedient Systems, LLC ("Respondent") obtained a registration for the mark ESPEEDIENT SYSTEMS, Registration No. 2,912,657, for "providing a financial system integrating a browser based account management and customer relationship management system within one central database to provide banking, debit card, stored value and digital currency products in a host system or proprietary deployment system" in International Class 42. Respondent claimed a date of first use in commerce of January 3, 2001, a date well after Petitioner had first used the ESPEED Mark.

10. Respondent has promoted and sold its ESPEEDIENT SYSTEMS products and/or services to financial services firms and/or to businesses, consumers and/or users in the financial services field.

11. Respondent's ESPEEDIENT SYSTEMS mark, the dominant component of which is ESPEED, is identical to Petitioner's ESPEED Mark. Further, the ESPEEDIENT portion of Respondent's ESPEEDIENT SYSTEMS mark is confusingly similar in sound to Petitioner's ESPEED Mark. With regard to commercial meaning, the ESPEEDIENT SYSTEMS mark is virtually indistinguishable from the ESPEED Mark, particularly as the mere addition of the word "Systems," and/or the suffix "ient," does not distinguish the mark in any meaningful way. Moreover, the goods and/or services described in Respondent's registration are closely related or similar to those offered by Petitioner under its ESPEED Mark.

12. The continued registration by Respondent of the mark ESPEEDIENT SYSTEMS, the overall commercial impression of which is similar to Petitioner's ESPEED Mark, used on goods and services closely related or similar to the goods and/or services of Petitioner, is likely to cause confusion or to cause mistake, or to deceive, and will tend to damage Petitioner's goodwill in its ESPEED Mark. Respondent's continued registration and use of the ESPEEDIENT SYSTEMS mark will cause the public to believe mistakenly that Respondent's goods and/or services originate with, or are approved or licensed by Petitioner, or are otherwise connected or associated with Petitioner or Petitioner's goods and services in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

13. Petitioner is and will be irreparably damaged by the continued registration of the mark ESPEEDIENT SYSTEMS in Class 42 based on its prior use of the ESPEED Mark.

**GROUND 2 – NON-USE OF THE REGISTERED MARK AT THE TIME THE
§ 1(a) APPLICATION WAS FILED**

14. Petitioner hereby incorporates by reference the allegations of Paragraphs 1 through 13 hereof as if fully set forth herein.

15. On October 18, 2002, Respondent filed its application to register the ESPEEDIENT SYSTEMS mark, based on both its purported use of that mark in commerce, pursuant to Lanham Act § 1(a), 15 U.S.C. § 1051(a), and its purported *bona fide* intent to use that mark in commerce in connection with the same goods and services, pursuant to Lanham Act § 1(b), 15 U.S.C. § 1051(b). Respondent's application was assigned App. Ser. No. 78/175,874 (the "Application").

16. On November 5, 2003, and in response to an Office Action issued May 5, 2003, Respondent subsequently amended the Application to proceed solely on Respondent's alleged use of the ESPEEDIENT SYSTEMS mark in commerce pursuant to § 1(a), and deleted the § 1(b) filing basis. The Application ultimately matured to U.S. Trademark Reg. No. 2,912,657.

17. Pursuant to § 1(a), an applicant who files a trademark application under that section must have used the mark in commerce in connection with the goods and/or services identified in the application, and the application must contain a sworn statement attesting that the mark is in use in commerce in connection with such goods and/or services.

18. Upon information and belief, and despite its sworn representations to the Trademark Office to the contrary, Respondent had *not* used the ESPEEDIENT SYSTEMS mark in commerce in connection with *any* of the goods or services identified in the Application before its October 18, 2002, filing of the use-based Application to register the ESPEEDIENT SYSTEMS mark.

19. Continued registration of the ESPEEDIENT SYSTEMS mark, with a nationwide priority date of October 18, 2002, would be in contravention of § Section 1(a) of the Lanham Act.

20. Petitioner is and will be irreparably damaged by the continued registration of the ESPEEDIENT SYSTEMS mark in Class 42 based on its prior use of the ESPEED Mark, and because such continued registration gives Respondent color of right in its ESPEEDIENT SYSTEMS mark in violation of Petitioner's prior and superior rights in its ESPEED Mark.

GROUND 3 – FRAUD IN OBTAINING THE REGISTRATION

21. Petitioner hereby incorporates by reference the allegations of Paragraphs 1 through 20 hereof as if fully set forth herein.

22. On February 27, 2004, the Trademark Office rejected the specimens that Respondent had filed in support of the Application on the ground that the specimens Respondent had previously submitted did not evidence the rendition of any services at all. The Trademark Office's refusal of registration was therefore made final.

23. On May 19, 2004, Respondent filed a Request for Reconsideration of the Application. In connection with that Request for Reconsideration, Respondent filed a substitute specimen purporting to evidence use of the mark in connection with the identified services (the “Substitute Specimen”), together with a sworn declaration, signed by Melissa S. Dellenbeck, as Respondent’s “Attorney,” that, *inter alia*, “the substitute specimen(s) was in use in commerce as of the filing date of the application,” e.g., as of October 18, 2002.

24. Despite this representation to the Trademark Office (the “False Statement”), the Substitute Specimen bears a copyright notice dated 2004 and bears markings indicating that it was printed on March 10, 2004. Respondent has provided no explanation whatsoever for how a specimen dated in 2004 could have been in use in commerce before October 18, 2002.

25. Respondent and/or Ms. Dellenbeck knew or should have known that the Substitute Specimen was not in use in commerce before October 18, 2002.

26. Respondent and/or Ms. Dellenbeck knew or should have known that the False Statement was false and/or misleading.

27. Respondent, through Ms. Dellenbeck, made the False Statement to the Trademark Office in order to induce the Examiner, and/or other authorized agents of the Trademark Office, to grant Respondent a registration for the ESPEEDIENT SYSTEMS mark. The False Statement did, in fact, induce the Examiner, and/or other authorized agents of the Trademark Office, to grant such a registration to Respondent. The Examiner and/or other authorized agents of the Trademark Office reasonably

relied upon the truth of the False Statement in order to grant Respondent's registration for the ESPEEDIENT SYSTEMS mark, and would not have granted Respondent the registration for the goods and services specified therein but for the misrepresentations contained in the False Statement. Consequently, the False Statement was material to the procurement of Respondent's registration of the ESPEEDIENT SYSTEMS mark.

28. Respondent obtained the registration of the ESPEEDIENT SYSTEMS mark fraudulently, namely, by knowingly making false, material misrepresentations of fact, specifically, the False Statement, in its application to register the ESPEEDIENT SYSTEMS mark.

29. Petitioner is and will be irreparably damaged by the continued registration of the ESPEEDIENT SYSTEMS mark in Class 42 based on its prior use of the ESPEED Mark, and because such continued registration gives Respondent color of right in its ESPEEDIENT SYSTEMS mark in violation of Petitioner's prior and superior rights in its ESPEED Mark.

WHEREFORE, Petitioner requests that Registration No. 2,912,657 be canceled.

This paper is filed electronically.

Dated: New York, New York
_____, 2007

Respectfully submitted,

KILPATRICK STOCKTON LLP

Georges Nahitchevansky
Attorneys for Petitioner
31 W. 52nd Street, 14th Floor
New York, New York 10019
Telephone: (212) 775-8700
Facsimile: (212) 775-8820

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing PETITION TO CANCEL is being filed electronically with the TTAB via ESTTA on this day, _____, 2007.

Georges Nahitchevansky

EXHIBIT B

**TO PETITIONER'S MOTION FOR LEAVE TO
AMEND PETITION TO CANCEL, AND BRIEF IN
SUPPORT THEREOF**

eSpeed, Inc. v. Espeedient Systems, LLC
Cancellation No. 92046796

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration No. 2,912,657
For the mark: ESPEEDIENT SYSTEMS

X		
ESPEED, INC.,	:	
	:	Cancellation No.
Petitioner,	:	
	:	<u>AMENDED PETITION TO CANCEL</u>
v.	:	
	:	
ESPEEDIENT SYSTEMS, LLC,	:	
	:	
Respondent.	:	

X		

eSpeed, Inc., a corporation organized and existing under the laws of the state of Delaware with a principal place of business at 110 East 59th Street, New York, New York 10022, believes that it will be damaged by the above identified registration for the trademark ESPEEDIENT SYSTEMS shown in Registration No. 2,912,657 and hereby petitions to cancel that registration.

The grounds for this cancellation are as follows:

FACTS COMMON TO ALL GROUNDS FOR CANCELLATION

1. eSpeed, Inc., along with its affiliates (collectively “eSpeed” or “Petitioner”), is the largest broker of U.S. government securities, and is a well-known and respected provider of U.S. and international financial brokerage services and information throughout the world. Since at least as early as January, 1999, Petitioner has continuously used and promoted the trademarks ESPEED and E-SPEED (the

“ESPEED Mark”) and the ESPEED trade name in connection with a wide variety of online brokerage, financial, information, technological, software, e-commerce and communication services. In particular, Petitioner uses its ESPEED Mark and trade name for a network and internet-based communication and distribution system that provides customers with immediate access to real-time financial market information and to a global interactive electronic marketplace that enables the instantaneous trading of financial instruments and other products.

2. In addition, eSpeed uses its ESPEED Mark for its proprietary transaction software that can process millions of transactions in milliseconds and in connection with its telecommunication services to provide users with secure, point-to-point communication links for the delivery of data, the execution of transactions and access to the Internet. In total, the ESPEED service is not only a global interactive electronic trading network that can be adapted to virtually any market of any size, but a technological system that powers marketplaces for any type of tradable products.

3. Petitioner has invested a significant amount of time and effort promoting its ESPEED services and in developing goodwill associated with the ESPEED Mark and trade name. Further, Petitioner has obtained several federal registrations for its ESPEED Mark. It owns, *inter alia*, registration number 2,535,418, registered on February 5, 2002, for ESPEED for “computer software that enables trading in financial instruments, provides trade execution and trade confirmation capabilities, and provides access to financial information and financial market information, real time and otherwise” in International Class 9,

“telecommunications services, namely, electronic transmission of data via computer terminals” in International Class 38, and for a variety of financial services in International Class 36, including, *inter alia*, “providing a trading network via an electronic private intranet network and global computer network” and “providing information relating to financial instruments, brokerage, trading investments, companies, and financial markets through a global computer network.” Petitioner is also the owner of registration number 2,500,080, registered October 23, 2001, for ESPEED (stylized) for “telecommunication services, namely, electronic transmission of data; leasing telecommunications equipment and telecommunications lines; providing telecommunications connection to the global computer network” in International Class 38.

4. In addition, Petitioner also owns stylized registrations for ESPEED, including registration number 2,729,582, registered June 24, 2003, for “Computer software that enables trading in financial instruments, provides trade execution and trade confirmation capabilities, and provides access to financial information and financial market information, real time and otherwise, ” and registration number 2,484,458, registered September 4, 2001, for ESPEED (stylized) for “providing multiple-user access to a global computer information network and providing electronic mail services” in International Class 38.

5. Petitioner is also the owner of registration number 2,424,609, registered January 30, 2001, for E-SPEED for “brokerage services for transacting financial securities via a global computer network” in International Class 36. This registration

has become incontestable pursuant to Section 15 of the Lanham Act , 15 U.S.C. § 1065, and, as such, is conclusive evidence of the validity of the mark, of Petitioner's exclusive ownership of the mark and of its right to the exclusive use of the mark

6. Petitioner has offered and continues to offer and make available its ESPEED and E-SPEED services to consumers and the trade online through the Internet and through a proprietary electronic network.

7. As a result of Petitioner's usage and promotion of its ESPEED Mark, a very valuable and inestimable goodwill has been built up in the ESPEED Mark.

GROUND 1 – LIKELIHOOD OF CONFUSION

8. Petitioner hereby incorporates by reference the allegations of Paragraphs 1 through 7 hereof as if fully set forth herein.

9. ~~8.~~ On December 21, 2004, a date well after Petitioner first used the ESPEED Mark, eSpeedient Systems, LLC (“Respondent”) obtained a registration for the mark ESPEEDIENT SYSTEMS, Registration No. 2,912,657, for “providing a financial system integrating a browser based account management and customer relationship management system within one central database to provide banking, debit card, stored value and digital currency products in a host system or proprietary deployment system” in International Class 42. Respondent claimed a date of first use in commerce of January 3, 2001, a date well after Petitioner had first used the ESPEED Mark.

10. ~~9.~~ Respondent has promoted and sold its ESPEEDIENT SYSTEMS products and/or services to financial services firms and/or to businesses, consumers and/or users in the financial services field.

11. ~~10.~~ Respondent's ESPEEDIENT SYSTEMS mark, the dominant component of which is ESPEED, is identical to Petitioner's ESPEED Mark. Further, the ESPEEDIENT portion of Respondent's ESPEEDIENT SYSTEMS mark is confusingly similar in sound to Petitioner's ESPEED Mark. With regard to commercial meaning, the ESPEEDIENT SYSTEMS mark is virtually indistinguishable from the ESPEED Mark, particularly as the mere addition of the word "Systems," and/or the suffix "ient," does not distinguish the mark in any meaningful way. Moreover, the goods and/or services described in Respondent's registration are closely related or similar to those offered by Petitioner under its ESPEED Mark.

12. ~~11.~~ The continued registration by Respondent of the mark ESPEEDIENT SYSTEMS, the overall commercial impression of which is similar to Petitioner's ESPEED Mark, used on goods and services closely related or similar to the goods and/or services of Petitioner, is likely to cause confusion or to cause mistake, or to deceive, and will tend to damage Petitioner's goodwill in its ESPEED Mark. Respondent's continued registration and use of the ESPEEDIENT SYSTEMS mark will cause the public to believe mistakenly that Respondent's goods and/or services originate with, or are approved or licensed by Petitioner, or are otherwise

connected or associated with Petitioner or Petitioner's goods and services in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

13. ~~12.~~ Petitioner is and will be irreparably damaged by the continued registration of the mark ESPEEDIENT SYSTEMS in Class 42 based on its prior use of the ESPEED Mark.

**GROUND 2 – NON-USE OF THE REGISTERED MARK AT THE TIME THE
§ 1(a) APPLICATION WAS FILED**

14. Petitioner hereby incorporates by reference the allegations of Paragraphs 1 through 13 hereof as if fully set forth herein.

15. On October 18, 2002, Respondent filed its application to register the ESPEEDIENT SYSTEMS mark, based on both its purported use of that mark in commerce, pursuant to Lanham Act § 1(a), 15 U.S.C. § 1051(a), and its purported *bona fide* intent to use that mark in commerce in connection with the same goods and services, pursuant to Lanham Act § 1(b), 15 U.S.C. § 1051(b). Respondent's application was assigned App. Ser. No. 78/175,874 (the "Application").

16. On November 5, 2003, and in response to an Office Action issued May 5, 2003, Respondent subsequently amended the Application to proceed solely on Respondent's alleged use of the ESPEEDIENT SYSTEMS mark in commerce pursuant to § 1(a), and deleted the § 1(b) filing basis. The Application ultimately matured to U.S. Trademark Reg. No. 2,912,657.

17. Pursuant to § 1(a), an applicant who files a trademark application under that section must have used the mark in commerce in connection with the goods and/or services identified in the application, and the application must contain a sworn

statement attesting that the mark is in use in commerce in connection with such goods and/or services.

18. Upon information and belief, and despite its sworn representations to the Trademark Office to the contrary, Respondent had *not* used the ESPEEDIENT SYSTEMS mark in commerce in connection with *any* of the goods or services identified in the Application before its October 18, 2002, filing of the use-based Application to register the ESPEEDIENT SYSTEMS mark.

19. Continued registration of the ESPEEDIENT SYSTEMS mark, with a nationwide priority date of October 18, 2002, would be in contravention of § Section 1(a) of the Lanham Act.

20. Petitioner is and will be irreparably damaged by the continued registration of the ESPEEDIENT SYSTEMS mark in Class 42 based on its prior use of the ESPEED Mark, and because such continued registration gives Respondent color of right in its ESPEEDIENT SYSTEMS mark in violation of Petitioner's prior and superior rights in its ESPEED Mark.

GROUND 3 – FRAUD IN OBTAINING THE REGISTRATION

21. Petitioner hereby incorporates by reference the allegations of Paragraphs 1 through 20 hereof as if fully set forth herein.

22. On February 27, 2004, the Trademark Office rejected the specimens that Respondent had filed in support of the Application on the ground that the specimens Respondent had previously submitted did not evidence the rendition of any

services at all. The Trademark Office's refusal of registration was therefore made final.

23. On May 19, 2004, Respondent filed a Request for Reconsideration of the Application. In connection with that Request for Reconsideration, Respondent filed a substitute specimen purporting to evidence use of the mark in connection with the identified services (the "Substitute Specimen"), together with a sworn declaration, signed by Melissa S. Dellenbeck, as Respondent's "Attorney," that, *inter alia*, "the substitute specimen(s) was in use in commerce as of the filing date of the application." e.g., as of October 18, 2002.

24. Despite this representation to the Trademark Office (the "False Statement"), the Substitute Specimen bears a copyright notice dated 2004 and bears markings indicating that it was printed on March 10, 2004. Respondent has provided no explanation whatsoever for how a specimen dated in 2004 could have been in use in commerce before October 18, 2002.

25. Respondent and/or Ms. Dellenbeck knew or should have known that the Substitute Specimen was not in use in commerce before October 18, 2002.

26. Respondent and/or Ms. Dellenbeck knew or should have known that the False Statement was false and/or misleading.

27. Respondent, through Ms. Dellenbeck, made the False Statement to the Trademark Office in order to induce the Examiner, and/or other authorized agents of the Trademark Office, to grant Respondent a registration for the ESPEEDIENT SYSTEMS mark. The False Statement did, in fact, induce the Examiner, and/or other

authorized agents of the Trademark Office, to grant such a registration to Respondent. The Examiner and/or other authorized agents of the Trademark Office reasonably relied upon the truth of the False Statement in order to grant Respondent's registration for the ESPEEDIENT SYSTEMS mark, and would not have granted Respondent the registration for the goods and services specified therein but for the misrepresentations contained in the False Statement. Consequently, the False Statement was material to the procurement of Respondent's registration of the ESPEEDIENT SYSTEMS mark.

28. Respondent obtained the registration of the ESPEEDIENT SYSTEMS mark fraudulently, namely, by knowingly making false, material misrepresentations of fact, specifically, the False Statement, in its application to register the ESPEEDIENT SYSTEMS mark.

29. Petitioner is and will be irreparably damaged by the continued registration of the ESPEEDIENT SYSTEMS mark in Class 42 based on its prior use of the ESPEED Mark, and because such continued registration gives Respondent color of right in its ESPEEDIENT SYSTEMS mark in violation of Petitioner's prior and superior rights in its ESPEED Mark.

WHEREFORE, Petitioner requests that Registration No. 2,912,657 be canceled.

~~.....The cancellation fee in the amount of \$300.00 for a cancellation in one class is filed herewith. If for any reason this amount is insufficient, it is requested that~~

~~Petitioner's attorneys' Deposit Account No. 11-0860 be charged with any deficiency.~~

This paper is filed electronically.

Dated: New York, New York

~~December 19~~_____, 20067

Respectfully submitted,

KILPATRICK STOCKTON LLP

By: _____

Georges Nahitchevansky

Attorneys for Petitioner

31 W. 52nd Street, 14th Floor

New York, New York 10019

Telephone: (212) 775-8700

Facsimile: (212) 775-8820

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing PETITION TO CANCEL is being filed electronically with the TTAB via ESTTA on this day, ~~December 19~~_____, 20067.

Georges Nahitchevansky

EXHIBIT C

**TO PETITIONER'S MOTION FOR LEAVE TO
AMEND PETITION TO CANCEL, AND BRIEF IN
SUPPORT THEREOF**

eSpeed, Inc. v. Espeedient Systems, LLC
Cancellation No. 92046796

Drawing Page**Serial Number:**

78175874

Applicant:

eSpeedient Systems, LLC
225 West Huron
Suite 217
Chicago IL USA 60610

**Date of First Use:**

12/20/2000

Date of First Use in Commerce:

01/03/2001

Goods and Services:

eSpeedient is part of the Entity Name as well as the entity's principal product and service. The principal product/Service is a financial software system integrating a browser based account management and CRM system within one central database to provide banking, debit card, stored value and digital currency products in a host(ASP/private label) based system or in a proprietary deployment (system sale and independent installation on customer datacenter. What distinguishes the service from the product is whether the system (eSpeedient Management System or "EMS") is operated by eSpeedient Systems in a host/ASP environment or wheter the system is licensed by an entity to operate within their own data center. eSpeedeint distinguishes those services or systems operated/provided through eSpeedient Systems, LLC. Application originally filed may 4, 2001 serial number assigned 78/062127

Goods and Services:

eSpeedient is part of the Entity Name as well as the entity's principal product and service. The principal product/Service is a financial software system integrating a browser based account management and CRM system within one central database to provide banking, debit card, stored value and digital currency products in a host(ASP/private label) based system or in a proprietary deployment (system sale and independent installation on customer datacenter. What distinguishes the service from the product is whether the system (eSpeedient Management System or "EMS") is operated by eSpeedient Systems in a host/ASP environment or wheter the system is licensed by an entity to operate within their own data center. eSpeedeint distinguishes those services or systems operated/provided through eSpeedient Systems, LLC. Application originally filed may 4, 2001 serial number assigned 78/062127

Mark:

eSpeedient Systems, LLC



NO OCR



10-18-2002

eSpeedient Systems, LLC

Internet Transmission Date:

2002/10/18

Serial Number:

78175874

Filing Date:

2002/10/18



TRADEMARK APPLICATION

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
FEE RECORD SHEET

TOTAL FEES PAID: \$325

RAM SALE NUMBER: 596
RAM ACCOUNTING DATE: 20021018



NO OCR



10-18-2002

DOCUMENT INFORMATION**TRADEMARK/SERVICEMARK APPLICATION****VERSION 1.24****APPLICANT INFORMATION**

NAME	eSpeedient Systems, LLC
STREET	225 West Huron
LN2	Suite 217
CITY	Chicago
STATE	IL
COUNTRY	USA
ZIP/POSTAL CODE	60610
TELEPHONE NUMBER	312-751-9486
FAX NUMBER	312-943-3853
E-MAIL ADDRESS	pdubunque@espeedient.com
AUTHORIZE E-MAIL COMMUNICATION	Yes

APPLICANT ENTITY INFORMATION

OTHER ENTITY TYPE: SPECIFIC NATURE OF ENTITY	Limited Liability Company Managing Members: Paul E. Dubuque, USA Raymond A. Boyd, USA Brian J. Saville, USA
STATE/COUNTRY UNDER WHICH ORGANIZED	Illinois

TRADEMARK/SERVICEMARK INFORMATION

MARK	eSpeedient
TYPED FORM	No

BASIS FOR FILING AND GOODS/SERVICES INFORMATION

USE IN COMMERCE: SECTION 1(a)	Yes
SPECIMEN	Yes
SPECIMEN DESCRIPTION	The specimen is a gif file of the company name eSpeedient Systems, LLC. We have PDF files used for business cards and letterhead as well.
LISTING OF GOODS AND/OR SERVICES	eSpeedient is part of the Entity Name as well as the entity's principal product and service. The principal product/Service is a financial software system integrating a browser based account management and CRM system within one central database to provide banking, debit card, stored value and digital currency products in a host(ASP/private label) based system or in a proprietary deployment (system sale and independent installation on customer datacenter. What distinguishes the service from the product is whether the system (eSpeedient Management System or "EMS") is operated by eSpeedient Systems in a host/ASP environment or wheter the system is licensed by an entity to operate within their own data center. eSpeedeint distinguishes those services or systems operated/provided through eSpeedient Systems, LLC. Application originally filed may 4, 2001 serial number assigned 78/062127
FIRST USE ANYWHERE DATE	12/20/2000
FIRST USE IN COMMERCE DATE	01/03/2001

BASIS FOR FILING AND GOODS/SERVICES INFORMATION

INTENT TO USE: SECTION 1(b)	Yes
LISTING OF GOODS AND/OR SERVICES	eSpeedient is part of the Entity Name as well as the entity's principal product and service. The principal product/Service is a financial software system integrating a browser based account management and CRM system within one central database to provide banking, debit card, stored value and digital currency products in a host(ASP/private label) based system or in a proprietary deployment (system sale and independent installation on customer datacenter. What distinguishes the service from the product is whether the system (eSpeedient Management System or "EMS") is operated by eSpeedient Systems in a host/ASP environment or wheter the system is licensed by an entity to operate within their own data center. eSpeedeint distinguishes those services or systems operated/provided through eSpeedient Systems, LLC. Application originally filed may 4, 2001 serial number assigned 78/062127

OPTIONAL INFORMATION

DISCLAIMER	"No claim is made to the exclusive right to use systems, llc apart from the mark as
------------	---

	shown."
DESCRIPTION OF THE MARK	"The mark consists of eSpeedient."
FEE INFORMATION	
TOTAL FEES PAID	325
NUMBER OF CLASSES PAID	1
NUMBER OF CLASSES	1
LAW OFFICE INFORMATION	
E-MAIL ADDRESS FOR CORRESPONDENCE	pdubuque@espeedient.com
SIGNATURE AND OTHER INFORMATION	
SIGNATURE	/pauletiennedubuque/
DATE	10/18/2002
NAME	Paul E. Dubuque
TITLE	Managing Member
MAILING ADDRESS	
LINE	eSpeedient Systems, LLC
LINE	225 West Huron
LINE	Suite 217
LINE	Chicago IL 60610
RAM INFORMATION	
RAM SALE NUMBER	596
RAM ACCOUNTING DATE	20021018
SERIAL NUMBER INFORMATION	

SERIAL NUMBER	78/175874
INTERNET TRANSMISSION DATE	Friday, 10-18-2002 12:10:59 EDT
TEAS STAMP	USPTO-668854190-2002101812106573-78/175874- 124f3eee689bd0e1ff58183ba6eb75ac7a8-RAM-596-2002101812076573
E-MAIL ADDRESS FOR ACKNOWLEDGMENT	pdubuque@espeedient.com

<SERIAL NUMBER> 78175874

<FILING DATE> 10/18/2002

<DOCUMENT INFORMATION>

<TRADEMARK/SERVICEMARK APPLICATION>

<VERSION 1.24>

<APPLICANT INFORMATION>

<NAME> eSpeedient Systems, LLC
<STREET> 225 West Huron
<LN2> Suite 217
<CITY> Chicago
<STATE> IL
<COUNTRY> USA
<ZIP/POSTAL CODE> 60610
<TELEPHONE NUMBER> 312-751-9486
<FAX NUMBER> 312-943-3853
<E-MAIL ADDRESS> pdubueque@espeedient.com
<AUTHORIZE E-MAIL COMMUNICATION> Yes

<APPLICANT ENTITY INFORMATION>

<OTHER ENTITY TYPE: SPECIFIC NATURE OF ENTITY> Limited Liability Company
Managing Members: Paul E. Dubuque, USA Raymond A. Boyd, USA Brian J. Saville, USA
<STATE/COUNTRY UNDER WHICH ORGANIZED> Illinois

<TRADEMARK/SERVICEMARK INFORMATION>

<MARK> eSpeedient

<TYPED FORM> No

* Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). *

<BASIS FOR FILING AND GOODS/SERVICES INFORMATION>

<USE IN COMMERCE: SECTION 1(a)> Yes

* Applicant is using or is using through a related company the mark in commerce on or in connection with the below-identified goods/services. (15 U.S.C. Section 1051(a), as amended.). Applicant attaches one SPECIMEN for each class showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services. *

<SPECIMEN> Yes

<SPECIMEN DESCRIPTION> The specimen is a gif file of the company name eSpeedient Systems, LLC. We have PDF files used for business cards and letterhead as well.

<LISTING OF GOODS AND/OR SERVICES> eSpeedient is part of the Entity Name as well as the entity's principal product and service. The principal product/Service is a financial software system integrating a browser based account management and CRM system within one central database to provide banking, debit card, stored value and digital currency products in a host(ASP/private label) based system or in a proprietary deployment (system sale and independent installation on customer datacenter. What distinguishes the service from the product is whether the system (eSpeedient Management System or "EMS") is operated by eSpeedient Systems in a host/ASP environment or whether the system is licensed by an entity to operate within their own data center. eSpeedeint distinguishes those services or systems operated/provided through eSpeedient Systems, LLC. Application originally filed may 4, 2001 serial number assigned 78/062127

<FIRST USE ANYWHERE DATE> 12/20/2000

<FIRST USE IN COMMERCE DATE> 01/03/2001

<BASIS FOR FILING AND GOODS/SERVICES INFORMATION>

<INTENT TO USE: SECTION 1(b)> Yes

* Applicant has a bona fide intention to use or use through a related company the mark in commerce on or in connection with the below-identified goods/services. (15 U.S.C. Section 1051(b), as amended.) *

<LISTING OF GOODS AND/OR SERVICES> eSpeedient is part of the Entity Name as well as the entity's principal product and service. The principal product/Service is a financial software system integrating a browser based account management and CRM system within one central database to provide banking, debit card, stored value and digital currency products in a host(ASP/private label) based system or in a proprietary deployment (system sale and independent installation on customer datacenter. What distinguishes the service from the product is whether the system (eSpeedient Management System or "EMS") is operated by eSpeedient Systems in a host/ASP environment or whether the system is licensed by an entity to operate within their own data center. eSpeedeint distinguishes those services or systems operated/provided through eSpeedient Systems, LLC. Application originally filed may 4, 2001 serial number assigned 78/062127

<OPTIONAL INFORMATION>

<DISCLAIMER> "No claim is made to the exclusive right to use systems, llc apart from the mark as shown."

<DESCRIPTION OF THE MARK> "The mark consists of eSpeedient."

<FEE INFORMATION>

<TOTAL FEES PAID> 325

<NUMBER OF CLASSES PAID> 1

<NUMBER OF CLASSES> 1

<LAW OFFICE INFORMATION>

* The USPTO is authorized to communicate with the applicant at the below e-mail address *

<E-MAIL ADDRESS FOR CORRESPONDENCE> pdubuque@espeedient.com

<SIGNATURE AND OTHER INFORMATION>

* PTO-Application Declaration: The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

*

<SIGNATURE>	/pauletiennedubuque/
<DATE>	10/18/2002
<NAME>	Paul E. Dubuque
<TITLE>	Managing Member

<MAILING ADDRESS>

<LINE>	eSpeedient Systems, LLC
<LINE>	225 West Huron
<LINE>	Suite 217
<LINE>	Chicago IL 60610

<RAM INFORMATION>

<RAM SALE NUMBER>	596
<RAM ACCOUNTING DATE>	20021018

<SERIAL NUMBER INFORMATION>

<SERIAL NUMBER>	78/175874
<INTERNET TRANSMISSION DATE>	Friday, 10-18-2002 12:10:59 EDT
<TEAS STAMP>	

USPTO-668854190-2002101812106573-78/175874-124f3eee689bd0e1ff58183ba6eb75ac7a8-
RAM-596-2002101812076573

E-MAIL ADDRESS FOR ACKNOWLEDGMENT> pdubuque@espeedient.com

EXHIBIT D

**TO PETITIONER'S MOTION FOR LEAVE TO
AMEND PETITION TO CANCEL, AND BRIEF IN
SUPPORT THEREOF**

eSpeed, Inc. v. Espeedient Systems, LLC
Cancellation No. 92046796

To: eSpeedient Systems, LLC (pdubuque@espeedient.com)
Subject: TRADEMARK APPLICATION NO. 78175874 - ESPEEDIENT SYSTEMS, LLC - N/A
Sent: 5/5/03 9:02:30 AM
Sent As: ECom106
Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/175874

APPLICANT: eSpeedient Systems, LLC

CORRESPONDENT ADDRESS:

eSpeedient Systems, LLC
225 West Huron
Suite 217
Chicago IL 60610

RETURN ADDRESS:

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514
ecom106@uspto.gov

MARK: ESPEEDIENT SYSTEMS, LLC

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:

pdubuque@espeedient.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

TO AVOID ABANDONMENT, WE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF OUR MAILING OR E-MAILING DATE.

Serial Number 78/175874

The assigned examining attorney has reviewed the referenced application and determined the following.

SEARCH RESULTS

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 1105.01.

MULTIPLE CLASSES--INSUFFICIENT FEE

The application identifies goods and services that may be classified in several international classes. Effective January 1, 2003, the fee for filing an application for trademark registration will be increased to **\$335.00** per International Class. Additionally, the fee for amending an existing application to add an additional class or classes of goods/services will be \$335.00 per class for classes added on or after January 1, 2003. Therefore, the applicant must either: (1) restrict the application to the number of classes covered by the fee already paid, or (2) pay the required fee for each additional class. 37 C.F.R. Section 2.86(b); TMEP sections 810.01 and 1113.01.

If the applicant prosecutes this application as a combined, or multiple#class, application, the applicant must comply with each of the following:

(1) The applicant must submit one specimen of use for each class; the specimen must be of a type which were in use at least as early as the filing date of the application. 37 C.F.R. Section 2.86(b).

(2) The applicant must state dates of first use and use in commerce for the mark in each class; these dates must be at least as early as the filing date of this application. 37 C.F.R. Sections 2.33(a)(1)(vii) and 2.86(b).

(3) The applicant must submit an affidavit or a declaration under 37 C.F.R. Section 2.20 signed by the applicant to verify (1) and (2) above. 37 C.F.R. Sections 2.59(a) and 2.71(d)(1).

(4) The applicant must list the goods and services by international class with the classes listed in ascending numerical order. TMEP section 1113.01.

(5) The applicant must submit a filing fee for each international class of goods and services not covered by the fee already paid. 37 C.F.R. Sections 2.6(a)(1) and 2.86(b); TMEP sections 810.01 and 1113.01.

IDENTIFICATION OF GOODS

The recitation of goods contains superfluous language. The applicant must clarify the identification of goods by adopting the following, if accurate, and filling in details where required by the examining attorney: “financial software integrating a browser based account management and CRM (acronyms must be spelled out) system within one central database to provide banking, debit card, stored value and digital currency products in a host ASP (acronyms must be spelled out) based system or in a proprietary deployment”, in class 9. TMEP section 804.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(b); TMEP section 804.09. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

RECITATION OF SERVICES

The applicant must clarify the recitation of services by adopting, if accurate: “Installation of computer <http://atlas/netacgi/> - [h1http://atlas/netacgi/](http://atlas/netacgi/) - [h3](http://atlas/netacgi/)software” in class 42. TMEP section 1301.05.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(b); TMEP section 804.09. Therefore, the applicant may not amend to include any services that are not within the scope of the services recited in the present identification.

DRAWING CONTAINS GRAY

The drawing is not acceptable because it is a photocopy which will not reproduce satisfactorily. The applicant must submit a new drawing showing the mark clearly and conforming to 37 C.F.R. Section 2.52. TMEP section 807.05.

CANNOT ASSERT §1(A) AND §1(B) FOR THE SAME GOODS OR SERVICES

The applicant asserts use of the mark in commerce for the goods and services and applicant asserts that it has a bona fide intent to use the mark in commerce for the same goods/services. An applicant may not assert both use of the mark in commerce, under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and intent to use the mark in commerce, under Trademark Act Section 1(b), 15 U.S.C. §1051(b), for the same goods or services. 37 C.F.R. §2.34(b)(1); TMEP §806.02(b). The applicant must delete one basis or divide the goods/services between the two bases, as appropriate.

SPECIMENS

The specimen is unacceptable as evidence of actual trademark use because they appear to be just the name printed out & not a label for the goods. The applicant must submit a specimen showing the mark as used in commerce. 37 C.F.R. Section 2.56. Examples of acceptable specimens are tags, labels, instruction manuals, containers or photographs that show the mark on the goods or packaging. The applicant must verify, with an affidavit or a declaration under 37 C.F.R. Section 2.20, that the substitute specimen was in use in commerce at least as early as the filing date of the application. *Jim Dandy Co. v. Siler City Mills, Inc.*, 209 USPQ 764 (TTAB 1981); 37 C.F.R. Section 2.59(a); TMEP section 905.10.

SPECIMENS

The specimen is unacceptable as evidence of actual service mark use because they do not evidence any services at all. The applicant must submit a specimen showing the mark as it is used in commerce. 37 C.F.R. Section 2.56. Examples of acceptable specimens are signs, photographs, brochures or advertisements that show the mark used in the sale or advertising of the services. TMEP section 1301.04. The applicant must verify, with an affidavit or a declaration under 37 C.F.R. Section 2.20, that the substitute specimen was in use in commerce at least as early as the filing date of the application. 37 C.F.R. Section 2.59(a); TMEP section 905.10.

DECLARATION – SUBSTITUTE SPECIMENS

The statement supporting use of the substitute specimen must read as follows:

The substitute specimen was in use in commerce at least as early as the filing date of the application.

The applicant must sign this statement either in affidavit form or with a declaration under 37 C.F.R. Section 2.20.

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that the facts set forth in this application are true; all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

(Signature)

(Print or Type Name and Position)

(Date)

No set form is required for response to this Office action. The applicant must respond to each point raised. The applicant should simply set forth the required changes or statements and request that the Office enter them. The applicant must sign the response. In addition to the identifying information required at the beginning of this letter, the applicant should always provide a telephone number to speed up further processing.

Fee increase effective January 1, 2003

*Effective January 1, 2003, the fee for filing an application for trademark registration will be increased to **\$335.00** per International Class. The USPTO will not accord a filing date to applications that are filed on or after that date that are not accompanied by a minimum of \$335.00.*

Additionally, the fee for amending an existing application to add an additional class or classes of goods/services will be \$335.00 per class for classes added on or after January 1, 2003.

Linda E. B. Mickleburgh
/lebm/
Examining Attorney
Law Office 106
703-308-9106 x222

How to respond to this Office Action:

To respond formally using the Office's Trademark Electronic Application System (TEAS), visit <http://www.uspto.gov/teas/index.html> and follow the instructions.

To respond formally via E-mail, visit <http://www.uspto.gov/web/trademarks/tmelecresp.htm> and follow the instructions.

To respond formally via regular mail, your response should be sent to the mailing Return Address listed above and include the serial number, law office and examining attorney's name on the upper right corner of each page of your response.

To check the status of your application at any time, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov/>

For general and other useful information about trademarks, you are encouraged to visit the Office's web site at <http://www.uspto.gov/main/trademarks.htm>

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY.

EXHIBIT E

**TO PETITIONER'S MOTION FOR LEAVE TO
AMEND PETITION TO CANCEL, AND BRIEF IN
SUPPORT THEREOF**

eSpeed, Inc. v. Espeedient Systems, LLC
Cancellation No. 92046796

Response to Office Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78175874
MARK SECTION (current)	
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	ESPEEDIENT SYSTEMS, LLC
COLOR MARK	NO
MARK SECTION (proposed)	
MARK FILE NAME	\\tcrs\EXPORT9\IMAGEOUT9\781\758\78175874\xml2\RO A0002.JPG
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	NO
LITERAL ELEMENT	ESPEEDIENT SYSTEMS
COLOR MARK	NO
PIXEL COUNT ACCEPTABLE	YES
PIXEL COUNT	900 x 300
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
ARGUMENT(S)	
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE	
TRADEMARK:	ESPEEDIENT SYSTEMS
APPLICANT:	eSpeedient Systems, LLC
SERIAL NO.:	78/175,874
FILED:	October 18, 2002
EXAMINING ATTORNEY:	Linda Mickelburgh, Law Office 106
Box RESPONSES - NO FEE Commissioner for Trademarks 2900 Crystal Drive Arlington, Virginia 22202-3514	
<u>REQUEST FOR RECONSIDERATION</u>	
<u>AMENDMENT</u>	
In response to the Final Office Action dated February 27, 2004, please delete the ", LLC" portion of the mark from the	

application and the drawing page.

REMARKS

In view of the foregoing amendment and these remarks, reconsideration of this application is respectfully requested.

In the Office Action, the Examining Attorney requested a new drawing of the mark. Accordingly, Applicant submits herewith a new drawing conforming to the requirements of 37 C.F.R. § 2.52. As reflected in the above amendment and the new drawing, Applicant has amended the description and drawing of the mark to remove ", LLC" from the mark. This amendment is not a material alteration of the mark under 37 C.F.R. § 2.72. See, e.g. In re Finlay Jewelry Corp., 41 U.S.P.Q.2d 1152 (T.T.A.B. 1996) (finding not a material alteration to amend the mark NY JEWELRY COMPANY to NEW YORK JEWELRY COMPANY because the old and new forms of the mark create the impression of being essentially the same mark).

Also, the Examining Attorney rejected Applicant's specimen on the ground that the specimen did not show use of the mark in connection with any services. Applicant submits herewith a substitute specimen showing use of the mark in connection with Applicant's services, as well as a Declaration Supporting Substitute Specimens. In accordance with 37 C.F.R. § 2.72, Applicant's substitute specimens conform to the proposed amendment of the mark to ESPEEDIENT SYSTEMS.

In view of the foregoing, the application is in condition for allowance. Applicant respectfully requests that the mark be passed to publication prior to the Notice of Appeal date.

Respectfully submitted,

Tina D. Kourasis
Melissa S. Dillenbeck
Attorneys for Applicant
GARDNER, CARTON & DOUGLAS LLP
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606
(312) 569-1459

Dated: May 19, 2004
Case No: ESS001USA

CH01/ 12346200.2

GOODS AND/OR SERVICES SECTION (current)

INTERNATIONAL CLASS	042
DESCRIPTION	
Providing a financial software system integrating a browser based account management and Customer Relationship Management system within one central database to provide banking, debit card, stored value and digital currency products in a host system or proprietary deployment system	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	12/20/2000
FIRST USE IN COMMERCE DATE	01/03/2001

GOODS AND/OR SERVICES SECTION (proposed)

INTERNATIONAL CLASS	042
DESCRIPTION	
Providing a financial software system integrating a browser based account management and Customer Relationship Management system within one central database to provide banking, debit card, stored value and digital currency products in a host system or proprietary deployment system	

FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	12/20/2000
FIRST USE IN COMMERCE DATE	01/03/2001
STATEMENT TYPE	The substitute specimen(s) was in use in commerce as of the filing date of the application.
SPECIMEN FILE NAME(S)	\\ticters\EXPORT9\IMAGEOUT9 \781\758\78175874\xml2\RO A0003.JPG
	\\ticters\EXPORT9\IMAGEOUT9 \781\758\78175874\xml2\RO A0004.JPG
SPECIMEN DESCRIPTION	portion of Applicant's website
SIGNATURE SECTION	
SIGNATURE	/Melissa S. Dillenbeck/
SIGNATORY NAME	Melissa S. Dillenbeck
SIGNATORY POSITION	Attorney
SIGNATORY DATE	05/19/2004
SIGNATURE	/Melissa S. Dillenbeck/
SIGNATORY NAME	Melissa S. Dillenbeck
SIGNATORY POSITION	Attorney
SIGNATORY DATE	05/19/2004
FILING INFORMATION SECTION	
SUBMIT DATE	Wed May 19 14:45:35 EDT 2004
TEAS STAMP	USPTO/OA-208463866-200405 19144535029097-78175874-2 00a42a69595fd4760e1f29742 2af591bc-N-N-200405191444 43137523

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Response to Office Action

To the Commissioner for Trademarks:

Application serial no. **78175874** is amended as follows:

Mark

Applicant proposes to amend the mark as follows:
Original: ESPEEDIENT SYSTEMS, LLC (Stylized and/or with Design)
Proposed: ESPEEDIENT SYSTEMS (Stylized and/or with Design, see mark)

The mark consists of standard characters, without claim to any particular font, style, size, or color.

Argument(s)

In response to the substantive refusal(s), please note the following:

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK: ESPEEDIENT SYSTEMS
APPLICANT: eSpeedient Systems, LLC
SERIAL NO.: 78/175,874
FILED: October 18, 2002
EXAMINING ATTORNEY: Linda Mickelburgh, Law Office 106

Box RESPONSES - NO FEE
Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3514

REQUEST FOR RECONSIDERATION

AMENDMENT

In response to the Final Office Action dated February 27, 2004, please delete the ", LLC" portion of the mark from the application and the drawing page.

REMARKS

In view of the foregoing amendment and these remarks, reconsideration of this application is respectfully requested.

In the Office Action, the Examining Attorney requested a new drawing of the mark. Accordingly, Applicant submits herewith a new drawing conforming to the requirements of 37 C.F.R. § 2.52. As reflected in the above amendment and the new drawing, Applicant has amended the description and drawing of the mark to remove ", LLC" from the mark. This amendment is not a material alteration of the mark under 37 C.F.R. § 2.72. See, e.g. In re Finlay Jewelry Corp., 41 U.S.P.Q.2d 1152 (T.T.A.B. 1996) (finding not a material alteration to amend the mark NY JEWELRY COMPANY to NEW YORK JEWELRY COMPANY because the old and new forms of the mark create the impression of being essentially the same mark).

Also, the Examining Attorney rejected Applicant's specimen on the ground that the specimen did not show use of the mark in connection with any services. Applicant submits herewith a substitute specimen showing use of the mark in connection with Applicant's services, as well as a Declaration Supporting Substitute Specimens. In accordance with 37 C.F.R. § 2.72, Applicant's substitute specimens conform to the proposed amendment of the mark to ESPEEDIENT SYSTEMS.

In view of the foregoing, the application is in condition for allowance. Applicant respectfully requests that the mark be passed to publication prior to the Notice of Appeal date.

Respectfully submitted,

Tina D. Kourasis
Melissa S. Dillenbeck
Attorneys for Applicant
GARDNER, CARTON & DOUGLAS LLP
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606
(312) 569-1459

Dated: May 19, 2004
Case No: ESS001USA

CH01/ 12346200.2

Classification and Listing of Goods/Services

Applicant hereby amends the following class of goods/services in the application as follows:

Current: Class 042 for Providing a financial software system integrating a browser based account management and Customer Relationship Management system within one central database to provide banking, debit card, stored value and digital currency products in a host system or proprietary deployment system

Original Filing Basis: 1(a).

Proposed: Class 042 for Providing a financial software system integrating a browser based account management and Customer Relationship Management system within one central database to provide banking, debit card, stored value and digital currency products in a host system or proprietary deployment system

Section 1(a), Use in Commerce: The mark was first used at least as early as 12/20/2000 and first used in commerce at least as early as 01/03/2001, and is now in use in such commerce.

Applicant hereby submits a specimen for Class 042.

The specimen(s) submitted consists of portion of Applicant's website.

For an application based on 1(a), Use in Commerce, "The substitute specimen(s) was in use in commerce as of the filing date of the application."

Specimen-1

Specimen-2

Declaration Signature

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this amendment/response on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, and that the mark is in use in commerce, and was in use in commerce on the application filing date, on or in connection with the goods and/or services listed in the application; or, if the application is being filed under 15 U.S.C. Section 1051(b), 1126(d) or 1126(e), he/she believes applicant to be entitled to use such mark in commerce, and that the applicant has a bona fide intention, and had a bona fide intention on the application filing date, to use the mark in commerce on or in connection with the goods and/or services listed in the application; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods and/or services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true as set forth within the original application and/or the submitted amendment/response.

Signature: /Melissa S. Dillenbeck/ Date: 05/19/2004

Signatory's Name: Melissa S. Dillenbeck

Signatory's Position: Attorney

Response Signature

Signature: /Melissa S. Dillenbeck/ Date: 05/19/2004

Signatory's Name: Melissa S. Dillenbeck

Signatory's Position: Attorney

Serial Number: 78175874

Internet Transmission Date: Wed May 19 14:45:35 EDT 2004

TEAS Stamp: USPTO/OA-208463866-20040519144535029097-

78175874-200a42a69595fd4760e1f297422af59

1bc-N-N-20040519144443137523

eSpeedient Systems

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eSpeedient Systems

FINANCIAL SERVICES

Banking

EMS supports an unlimited number of product offerings, multiple funding options, inter & intra-account transfers, and a unique set of account management tools including customer interaction history (real-time link with CRM activity) and session history all within one financial portal. Product offerings include joint and/or custodial accounts and the seamless integration of from external or third party applications such as mortgages, home equity or other credit related products. ID verification, fraud detection and geo-location are other third party services that can be integrated into the tailored solution.

Debit Card

The Debit Card is a unique product in that it can be part of banking environment or a stand alone application used to enhance an insurance, brokerage or other merchant service offering. Debit Cards provides access to a vast number of ATMs, and retail merchants to provide an attractive financial relationship for a consumer beyond that of a traditional bank.

Since the system is completely brandable, eSpeedient can provide a card program with as many individually tailored products for any number of different merchants. Some specific products could be a payroll card, a benefits card, a claim card, a retained asset card or simply a new way for consumers to access insurance and brokerage accounts.

ATM/Cash Card

An ATM/Cash Card offers instant access to cash and much of the purchasing power of a Debit Card. Many major retailers as well as grocery store chains include the ATM Card option in their Credit/Debit card terminals and actually prefer the transactional charges to that of Credit/Debit cards. For the card issuer, the ATM Card offers less regulatory scrutiny, which in turn attracts a broader market of consumers, as well as a significant reduction in assumption of liability for consumer fraud.

As with Debit Cards, ATM/Cash Cards can also support payroll card, benefit card, claim card, retained asset cards and other consumer account access need.

Stored Value



March 10, 2004

Enter your username and password to access the secure site.

Secure Login

User:

Pass:

Pre-paid cards operating over closed line systems provide consumers with cheap access to long distance, wireless services, municipal transportation, and purchasing power with mail and specific retail chains. These prepaid cards can operate independently, or be part of a banking, debit card or ATM Cash/Card solution.

Digital Currency

Whether you're an online retailer offering individual discounts or seeking to be a central currency exchange for a host of preferred merchants, eSpeedient has solution for you. Operating outside of electronic funds transfer networks, EMS supports private financial networks. As with each financial service solution, Digital Currency can be a separate offering or combined with one or more product platforms.

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